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6 IN THE UNITED STATES DISTRICT COURT  
7  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 MALIK JONES,

No. C 07-4277 CW (PR)

10 Plaintiff,

ORDER GRANTING DEFENDANT  
BAILEY'S MOTION TO DISMISS

11 v.

(Docket nos. 83, 85)

12 M. EVANS, et al.,

13 Defendants.  
\_\_\_\_\_/

14 MALIK JONES,  
No. C 09-3003 CW (PR)

15 Plaintiff,

ORDER REVIEWING SECOND AMENDED  
COMPLAINT; DISMISSED ALL  
CLAIMS AGAINST DEFENDANT P.  
BROWN; REQUIRING SERVICE ON  
DEFENDANTS E. RAMIREZ AND B.  
BROWN; ADDRESSING PLAINTIFF'S  
MOTION; AND ALLOWING FURTHER  
BRIEFING ON DEFENDANTS' MOTION  
TO DISMISS

16 v.

17 L. WASHINGTON, et al.,  
Defendants.  
\_\_\_\_\_/

(Docket no. 36)

21 INTRODUCTION

22 Plaintiff Malik Jones, a state prisoner currently incarcerated  
23 at High Desert State Prison (HDSP), filed this pro se civil rights  
24 complaint in Case no. C 07-4277 CW (PR) pursuant to 42 U.S.C.  
25 § 1983 alleging a violation of his constitutional rights while  
26 incarcerated at Salinas Valley State Prison (SVSP). On September  
27 19, 2008, the Court found cognizable Plaintiff's Eighth Amendment  
28 claims for excessive force and deliberate indifference to his

1 safety against Defendant SVSP Correctional Officer Bailey. The  
2 Court also found cognizable Plaintiff's Eighth Amendment claims for  
3 excessive force and deliberate indifference to his serious medical  
4 needs against Defendants SVSP Transportation Sergeant L. Washington  
5 and SVSP Transportation Officers D. Lang and E. Contreras.<sup>1</sup> The  
6 Court dismissed Plaintiff's Eighth Amendment claim for deliberate  
7 indifference to safety against Defendants Washington, Lang and  
8 Contreras with leave to amend. The Court dismissed Plaintiff's  
9 Eighth Amendment claims against Defendant Jane Doe without  
10 prejudice to filing an amended complaint to add her as a named  
11 defendant once he learns her identity.

12 On February 16, 2009, Defendants Bailey, Washington, Contreras  
13 and Lang filed a motion to dismiss, arguing that Plaintiff had not  
14 complied with Federal Rules of Civil Procedure 18(a) and 20(a)  
15 because he asserted unrelated claims against multiple Defendants.

16 On June 3, 2009, Plaintiff filed a motion entitled, "Motion  
17 for leave to file an Amendant [sic] Complaint" in Case no. C 07-  
18 4277 CW (PR), in which he identified Defendant Jane Doe as  
19 Defendant P. Brown.

20 In an Order dated July 2, 2009, the Court partially granted  
21 Defendants' motion to dismiss and severed the claims against  
22 Defendants Washington, Lang, Contreras and P. Brown, assigning to  
23 them a new case number: C 09-3003 CW (PR). The Court also granted  
24 Plaintiff's motion to amend, and directed the Clerk of the Court to  
25 substitute Defendant P. Brown for Defendant Jane Doe, but to do so  
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27       <sup>1</sup> Defendant Contreras's name was initially misspelled as  
28 "Contrazs" in Plaintiff's original complaint and the Order of  
Service. However, the correct spelling is "Contreras." (Defs'.  
Answer at 1.)

1 in Case no. C 09-3003 CW (PR). Meanwhile, the claims against  
2 Defendant Bailey remained in Case no. C 07-4277 CW (PR).

3 The Court directed the Clerk of the Court to file in Case no.  
4 C 09-3003 CW (PR) copies of the "Motion for leave to file an  
5 Amendant [sic] Complaint" and the original complaint.

6 On July 22, 2009, Plaintiff filed a second amended complaint  
7 (docket no. 46 in Case no. C 07-4277 CW (PR)), involving claims in  
8 Case no. C 09-3003 CW (PR). Plaintiff could not file this second  
9 amended complaint as of right, see Fed. R. Civ. P. 15(a), and did  
10 not move for leave to amend to file it. The Court will deem his  
11 filing to be a motion for leave to amend. Because it is related to  
12 claims in Case no. C 09-3003 CW (PR), it will be considered in that  
13 case. The Court will address the proposed second amended complaint  
14 below.

15 Before the Court in Case no. C 07-4277 CW (PR) are Defendant  
16 Bailey's motion to dismiss for failure to exhaust administrative  
17 remedies, and his motion for summary judgment under Federal Rule of  
18 Civil Procedure 56(c) for Plaintiff's failure to initiate this  
19 action before the statute of limitations ran on his claims.  
20 Plaintiff filed an opposition, and Defendant Bailey filed his reply  
21 to the opposition.

22 Also before the Court is Plaintiff's "Supplemental Motion to  
23 Add Information" in connection with his deposition held October 7,  
24 2010, filed in both Case nos. C 07-4277 CW (PR) and C 09-3003 CW  
25 (PR).

26 Finally, before the Court in Case no. C 09-3003 CW (PR) are  
27 (1) a motion to dismiss all claims against Defendant P. Brown;  
28 (2) Defendants Washington's, Lang's and Contreras's motion to

1 dismiss for failure to exhaust administrative remedies; and  
2 (3) their motion for summary judgment under Federal Rule of Civil  
3 Procedure 56(c) on the grounds that there is no genuine issue as to  
4 any material fact, that they are entitled to judgment as a matter  
5 of law, and that they are entitled to qualified immunity.

6 Plaintiff filed an opposition, and Defendants filed their reply to  
7 the opposition.

8 Having considered the papers filed by the parties, the Court  
9 GRANTS Defendant Bailey's motion to dismiss for failure to exhaust  
10 administrative remedies in Case no. C 07-4277 CW (PR).<sup>2</sup> The Court  
11 also addresses Plaintiff's motion to add information in Case nos.  
12 C 07-4277 CW (PR) and C 09-3003 CW (PR). The Court DISMISSES all  
13 claims against Defendant P. Brown and substitutes Defendant B.  
14 Brown in Case no. C 09-3003 CW (PR). The Court orders service of  
15 the complaint (docket no. 1 in Case no. C 09-3003 CW (PR)) and the  
16 second amended complaint (docket no. 46 in Case no. C 07-4277 CW  
17 (PR)) on Defendant B. Brown. These complaints set out cognizable  
18 Eighth Amendment claims against Defendant Jane Doe, now B. Brown,  
19 for the use of excessive force and for deliberate indifference to  
20 medical needs. Upon considering the proposed second amended  
21 complaint, the Court finds cognizable Eighth Amendment claims for  
22 the use of excessive force and for deliberate indifference to  
23 medical needs against Defendant Ramirez; therefore, the Court  
24 GRANTS Plaintiff's motion for leave to amend to add these claims to  
25 Case no. C 09-3003 CW (PR). The Court orders service of the  
26 complaint (docket no. 1 in Case no. C 09-3003 CW (PR)) and second

27 \_\_\_\_\_  
28 <sup>2</sup> Because the Court grants Defendant Bailey's motion to  
dismiss, it need not address his motion for summary judgment.

1 amended complaint (docket no. 46 in Case no. C 07-4277 CW (PR)) on  
2 Defendant Ramirez. Upon considering the amended Eighth Amendment  
3 claim for deliberate indifference to safety against Defendants  
4 Washington, Lang, Contreras and B. Brown raised by Plaintiff in his  
5 second amended complaint, the Court DENIES his motion for leave to  
6 amend to add this claim because he fails to state a cognizable  
7 claim. Upon considering the remaining claims raised in his second  
8 amended complaint, the Court also DENIES Plaintiff's motion for  
9 leave to amend to add his due process and equal protection claims  
10 against Defendant Ramirez as well as all claims against Defendants  
11 Sanquist and Bocello. Finally, the Court will not rule on  
12 Defendants Washington's, Lang's and Contreras's motion to dismiss  
13 and motion for summary judgment in Case no. C 09-3003 CW (PR)  
14 because it GRANTS Plaintiff's motion to supplement his opposition  
15 to their motions.

## FACTUAL BACKGROUND<sup>3</sup>

17 On June 24, 2003, Plaintiff -- who is wheel-chair bound -- and  
18 his cell-mate Inmate Gentry moved from Facility D, Building 8 to  
19 Facility D, Building 2. Defendant Bailey checked Plaintiff's  
20 property as he moved into the new cell. Plaintiff alleges  
21 Defendant Bailey "threw away Plaintiff's legal documents . . . ." (Second Am. Compl. at 7.) Defendant Bailey and Plaintiff "got into  
22 a verbal heated altercation." (*Id.*) Plaintiff alleges Defendant  
23 Bailey then "pushed Plaintiff out of his wheelchair with intent to  
24 inflict [sic] pain on Plaintiff." (*Id.*)

26 Plaintiff also claims that while he was incarcerated at SVSP,

<sup>3</sup> The factual background cites to documents only in Case no. C 07-4277 CW (PR).

1 Defendant Bailey created a "false" 128G chrono which "fabricated"  
2 that Plaintiff "was a child molester" and had committed "lewd and  
3 or lascivious crimes against children."<sup>4</sup> (Compl. at 3.) Plaintiff  
4 alleges Defendant Bailey distributed the false 128G chrono to other  
5 inmates in an effort to "get Plaintiff killed or seriously  
6 injured." (Id.)

7 Plaintiff was transferred to HDSP on July 7, 2006.

8 On July 25, 2006,<sup>5</sup> Plaintiff submitted appeal log no. SVSP  
9 C-06-02436, alleging Defendant Bailey falsified a 128G chrono and  
10 distributed it to other inmates in order to get Plaintiff "killed  
11 or seriously injured." (Medina Decl., Ex. I.) Log no. SVSP  
12 C-06-02436 was denied at the first level of review and returned to  
13 Plaintiff on September 16, 2006. The screening form attached to  
14 log no. SVSP C-06-02436 stated that Plaintiff's appeal was being  
15 returned to him because "time constraints were not met." (Id.)

16 On October 17, 2006, Plaintiff submitted another inmate appeal  
17 alleging Officer Bailey falsified a 128G chrono and distributed it  
18 to other inmates in order to get Plaintiff "killed or seriously  
19 injured." (Compl. at 30.) The informal level review response  
20 screened out the October 17, 2006 appeal on December 14, 2006  
21 because it was a "duplicate" of another. (Id. at 29.) The October  
22 17, 2006 appeal was not assigned a log number.

23 On November 26, 2006, Plaintiff submitted an inmate appeal

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25       <sup>4</sup> The record does not establish when in the year 2003 this  
26 alleged event occurred.

27       <sup>5</sup> Plaintiff has written the date that he submitted log no.  
28 SVSP C-06-02436 as "7-25-07." (Medina Decl., Ex. I.) The Court  
assumes Plaintiff mistakenly wrote "07" instead of "06" for the  
year.

1 alleging that when he received log no. SVSP C-06-02436, it was  
2 "missing" the first level of review response. (Id. at 20.)  
3 Plaintiff also alleged the screening-out decision for not meeting  
4 time constraints showed "blatant biasness [sic]," arguing that if  
5 time constraints were indeed not met, the inmate appeal would never  
6 have received a log number. (Id.)

7 Plaintiff also submitted an inmate appeal at HDSP, identified  
8 as log no. HDSP-06-01584, which "was related to Plaintiff's request  
9 for single cell status and transfer to" SVSP. (Mot. for Summ. J.  
10 at 10.) Log no. HDSP-06-01584 also identified Defendant Bailey.

11 DISCUSSION

12 I. Motion to Dismiss

13 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134,  
14 110 Stat. 1321 (1996) (PLRA), amended 42 U.S.C. § 1997e to provide  
15 that "[n]o action shall be brought with respect to prison  
16 conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
17 prisoner confined in any jail, prison, or other correctional  
18 facility until such administrative remedies as are available are  
19 exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion  
20 requirement is therefore mandatory, and no longer left to the  
21 discretion of the district court. Woodford v. Nqo, 548 U.S. 81, 85  
22 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

23 The PLRA's exhaustion requirement requires "proper exhaustion"  
24 of administrative remedies. Woodford, 548 U.S. at 93. This means  
25 "[p]risoners must now exhaust all 'available' remedies," id. at 85,  
26 in "compliance with an agency's deadlines and other critical  
27 procedural rules," id. at 90-91. The requirement cannot be  
28 satisfied "by filing an untimely or otherwise procedurally

1 defective administrative grievance or appeal." Id. Further, the  
2 remedies "available" need not meet federal standards, nor need they  
3 be "plain, speedy and effective." Porter v. Nussle, 534 U.S. 516,  
4 524 (2002); Booth, 532 U.S. at 739-40 & n.5. Even when the  
5 prisoner seeks relief not available in grievance proceedings,  
6 notably money damages, exhaustion is still a prerequisite to suit.  
7 Woodford, 548 U.S. at 85-86 (citing Booth, 532 U.S. at 734); see also Morton v. Hall, 599 F.3d 942, 945 (9th Cir. 2010).

8  
9 It is the prison's requirements, and not the PLRA, that define  
10 the boundaries of proper exhaustion. Jones v. Bock, 549 U.S. 199,  
11 218 (2007). The California Department of Corrections and  
12 Rehabilitation (CDCR) provides inmates the right to file  
13 administrative appeals alleging misconduct by correctional  
14 officers. See Cal. Code Regs. tit. 15, § 3084.1(e). CDCR also  
15 provides inmates the right to appeal administratively "any  
16 departmental decision, action, condition, or policy which they can  
17 demonstrate as having an adverse effect upon their welfare." See  
18 id. § 3084.1(a). In order to exhaust all available administrative  
19 remedies within this system, a prisoner must submit his complaint  
20 as an inmate appeal on a 602 form and proceed through several  
21 levels of appeal: (1) informal level grievance filed directly with  
22 any correctional staff member; (2) first formal level appeal filed  
23 with one of the institution's appeal coordinators; (3) second  
24 formal level appeal filed with the institution head or designee;  
25 and (4) third formal level appeal filed with the CDCR director or  
26 designee. Id. § 3084.5; Brodheim v. Cry, 584 F.3d 1262, 1264-65  
27 (9th Cir. 2009); Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D.  
28 Cal. 1997).

In California state prisons, the deadline for filing a 602 inmate appeal is fifteen working days from the date the administrative decision or action being complained of is taken. See Cal. Code Regs. tit. 15, § 3084.6(c); Ngo v. Woodford, 539 F.3d 1108, 1110 (9th Cir. 2008) (Ngo II) (finding claims unexhausted where filed more than fifteen working days after date of decision, i.e., after deadline in Title 15 of the California Code of Regulations § 3084.6(c) had passed). However, California prison regulations explicitly create an exception to the timely filing requirement if the inmate does not have the opportunity to file his grievance during the fifteen-day filing period. Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (remanding for district court to consider whether plaintiff had the opportunity to file a grievance within fifteen days after assault where his injuries and subsequent segregation rendered grievance form inaccessible). The appeals coordinator is only permitted to reject an untimely appeal if "[t]ime limits for submitting the appeal are exceeded and the appellant had the opportunity to file within the prescribed time constraints." Id. (quoting Cal. Code Regs. tit. 15, §§ 3084.6(c) and 3084.3(c)(6)). Where the inmate has all the information he needs in order to file a grievance, however, there is no delay of the fifteen-day filing period. Harvey, 605 F.3d at 684 (distinguishing Marella and finding inmate must grieve claim of excessive force within fifteen days of the date force was used, when plaintiff had all the information he needed about the use of force, not fifteen days from the date he later discovered he had respiratory problems caused by that use of force).

Non-exhaustion under § 1997e(a) is an affirmative defense

1 which should be brought by the defendants in an unenumerated motion  
2 to dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.  
3 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Defendant Bailey has  
4 done so in Case no. C 07-4277 CW (PR). The Court now considers  
5 whether Defendant Bailey's evidence is adequate to establish that  
6 Plaintiff failed to exhaust administrative remedies with respect to  
7 the present claims.

8 In support of his motion to dismiss Defendant Bailey provides  
9 the declaration of E. Medina, the appeals coordinator at SVSP.  
10 Appeals Coordinator Medina conducted a computerized search of the  
11 institutional appeals database for inmate appeals submitted by  
12 Plaintiff and for the appeal responses. He states in his  
13 declaration that he found the following:

- 14 11. None of the staff complaint inmate appeals  
15 submitted by Inmate Jones was reviewed past the  
second level of review except, Appeal No. SVSP-D-  
03-01719. Appeal No. SVSP-D-03- 01719 was not  
related to any conduct as described in Plaintiff's  
complaint. See Exhibit D.
- 17 12. There were two inmate appeals submitted by Inmate  
Jones at Salinas Valley from January 2003 to August  
2007 that mentioned Defendant Bailey, specifically  
Appeal No. SVSP-D- 03-02297 and Appeal No. SVSP-C-  
06-02436. Appeal No. SVSP-D-03-02297 was not  
reviewed past the second level of review. See  
Appeal No. SVSP-D-03-02297 dated July 6, 2003 and  
accompanying documents mentioned above as Exhibit  
F. Appeal No. SVSP-C-06-02436 was screened out on  
September 27, 2006. Inmate grievances that are  
"screened out" are returned to the inmate with  
instruction on how to correct the deficiency and  
informed to resubmit once the deficiency is  
correct. Plaintiff failed to resubmit the inmate  
grievance. See Appeal No. Appeal No. SVSP-C-06-  
02436 dated July 25, 2006 and accompanying document  
mentioned as Exhibit I above.
- 26 13. Inmate Jones did not submit any inmate appeals or  
27 have any inmate appeals proceed, past the second  
level of review that were directly related to  
28 Defendant Bailey allegedly falsifying and

1                   distributing a 128G Chrono or pushing Inmate Jones  
2                   out of a wheelchair.

3                   (Medina Decl. ¶ 11-13.)

4                   The Court's review of the records to which the declaration  
5                   refers shows Appeals Coordinator Medina's description to be  
6                   accurate.

7                   Plaintiff alleges SVSP prison officials "wantonly decided to  
8                   commit misconduct to prevent Plaintiff from exhausting." (Opp'n at  
9                   1.) Plaintiff argues that the administrative remedy became  
10                  "unavailable" for purposes of the exhaustion requirement when SVSP  
11                  officials prevented him from filing, and therefore he properly  
12                  exhausted his administrative remedies. (Id. at 2.)

13                  The Court finds unavailing Plaintiff's argument that prison  
14                  officials prevented him from exhausting. Although Plaintiff is not  
15                  required to allege that he resorted to extraordinary measures in  
16                  order to exhaust his administrative remedies, conclusory  
17                  allegations that the administrative remedies process is inadequate  
18                  are insufficient to defeat dismissal for failure to exhaust. See  
19                  White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997).

20                  Plaintiff also claims that log no. SVSP C-06-02436 was  
21                  "screened out under false pretense . . . ." (Id.) He argues the  
22                  screening-out decision for untimeliness amounted to a  
23                  "falsification of legal documents" designed to prevent Plaintiff  
24                  from exhausting his Eighth Amendment claim against Defendant  
25                  Bailey.

26                  As Appeals Coordinator Medina explained, inmate appeals that  
27                  are "screened out" are returned to the inmate with instructions on  
28                  how to correct the deficiency. (Medina Decl. ¶ 13.) The screening

1 form attached to log no. SVSP C-06-02436 and returned to Plaintiff  
2 indicated, "If you allege the above reason is inaccurate, then  
3 attach an explanation on a separate piece of paper, or use the back  
4 of this screen-out." (Medina Decl., Ex. I.) "Please return this  
5 form to the Appeals Coordinator with the necessary information  
6 attached." (Id.)

7 Plaintiff does not allege, nor does the record indicate, that  
8 he returned the form to the Appeals Coordinator with an explanation  
9 alleging the screening-out decision for untimeliness was  
10 inaccurate. Neither does Plaintiff allege that he did not have  
11 "the opportunity to file within the prescribed time constraints."  
12 Marella, 568 F.3d at 1027. To the contrary, Plaintiff claims  
13 that once he learned Defendant Bailey passed around a falsified  
14 128G chrono to other prisoners, he "confronted" Defendant Bailey  
15 himself. (Am. Compl. at 4.)

16 Therefore, the Court finds that because Plaintiff failed to  
17 complete the administrative review process in accordance with  
18 SVSP's applicable procedural rules,<sup>6</sup> his claims against Defendant  
19 Bailey are DISMISSED as unexhausted.

20 Accordingly, Defendant Bailey's motion to dismiss filed in  
21  
22

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23         <sup>6</sup> The record shows that after he was transferred to HDSP,  
24 Plaintiff completed the administrative review process as to log no.  
25 HDSP-06-01584 -- which identifies Defendant Bailey. However,  
26 Plaintiff could not exhaust his administrative remedies at HDSP  
27 with respect to his Eighth Amendment claim against Defendant Bailey  
stemming from the alleged falsified 128G chrono because he sought  
relief from HDSP, not from SVSP. As such, log no. HDSP-06-01584  
does not serve to exhaust Plaintiff's Eighth Amendment claim  
against Defendant Bailey.

1 Case no. C 07-4277 CW (PR) is GRANTED.<sup>7</sup> Dismissal is without  
2 prejudice to refiling if he is able to exhaust these claims. The  
3 Clerk shall enter judgment in accordance with this Order, terminate  
4 all pending motions and close the file.

5 II. Defendant P. Brown's Motion to Dismiss; Plaintiff's Second  
6 Amended Complaint; and Plaintiff's Motion to Supplement in  
Case no. C 09-3003 CW (PR)

7 The Court now reviews the second amended complaint filed in  
8 Case no. C 07-4277 CW (PR) (docket no. 46). First, because it is  
9 related to the claims in Case no. C 09-3003 CW (PR), the Court  
10 directs the Clerk to file the second amended complaint in Case no.  
11 C 09-3003 CW (PR).

12 A. Defendant Brown

13 As mentioned above, in the Order of Service in Case no. C 07-  
14 4277 CW (PR), the Court dismissed Plaintiff's Eighth Amendment  
15 claims for excessive force and deliberate indifference against  
16 Defendant Jane Doe with leave to amend. In Plaintiff's "Motion for  
17 leave to file an Amendant [sic] Complaint" (docket no. 44 in Case  
18 no. C 07-4277 CW (PR)), he identified Defendant Jane Doe as "P.  
19 Brown." (Pl.'s Mot. for Lv. to File Am. Compl. in Case no. C 07-  
20 4277 CW (PR) at 1.)

21 In an Order dated July 2, 2009, the Court granted Plaintiff's  
22 motion and directed the Clerk to substitute Defendant P. Brown for  
23 Defendant Jane Doe, but to do so in Case no. C 09-3003 CW (PR).

24 In the dispositive motion filed in Case no. C 09-3003 CW (PR),

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25  
26       <sup>7</sup> Because the Court grants Defendant Bailey's motion to  
27 dismiss for Plaintiff's failure to exhaust administrative remedies,  
it need not decide his motion for summary judgment under Federal  
28 Rule of Civil Procedure 56(c) for Plaintiff's failure to initiate  
this action before the statute of limitations ran on his claims.

1 Defendants claim that Defendant P. Brown was "erroneously  
2 identified as a transportation officer in the vehicle with  
3 Plaintiff during the transport to [HDSP] in a response to  
4 Plaintiff's discovery request." (Defs.' Mot. to Dismiss and Mot.  
5 for Summ. J. in Case no. C 09-3003 CW (PR) at 18.) They further  
6 state that Defendant P. Brown was "working as a correctional  
7 officer at Mule Creek State Prison on the day of the alleged  
8 incident," and thus "not involved in any way with the events  
9 occurring on July 7, 2006" at SVSP. (Id. at 18-19.) Therefore,  
10 they argue that all claims against Defendant P. Brown should be  
11 dismissed from this case. (Id. at 19.) Defendants have also  
12 amended their discovery response to identify the transportation  
13 officer as "B. Brown." (Id.)

14 Accordingly, the Court partially GRANTS the dispositive motion  
15 filed in Case no. C 09-3003 CW (PR) as to Defendant P. Brown and  
16 dismisses all claims against her. The Clerk is directed to amend  
17 the docket in Case no. C 09-3003 CW (PR) to reflect the correct  
18 initial of Defendant Brown's first name as "B." The Court orders  
19 service of the complaint (docket no. 1 in Case no. C 09-3003 CW  
20 (PR)) and the second amended complaint (docket no. 46 in Case no.  
21 C 07-4277 CW (PR)) on Defendant B. Brown. These complaints set out  
22 cognizable Eighth Amendment claims against Defendant Jane Doe, now  
23 B. Brown, for the use of excessive force and for deliberate  
24 indifference to medical needs.

25 B. Eighth Amendment Claims against Defendants Washington,  
26 Lang, Contreras and B. Brown for Deliberate Indifference  
to Safety

27 Plaintiff alleges in his original complaint in Case no. C 07-  
28 4277 CW (PR) that Defendants Washington, Lang, Contreras and Jane

1 Doe (now B. Brown) violated his Eighth Amendment right to be free  
2 of cruel and unusual punishment when they "forcibly" took him to  
3 HDSP. (Compl. at 6.)

4 The Eighth Amendment requires that prison officials take  
5 reasonable measures to guarantee the safety of prisoners. Farmer  
6 v. Brennan, 511 U.S. 825, 832 (1994). The failure of prison  
7 officials to protect inmates from dangerous conditions at the  
8 prison violates the Eighth Amendment only when two requirements are  
9 met: (1) the deprivation alleged is, objectively, sufficiently  
10 serious; and (2) the prison official is, subjectively, deliberately  
11 indifferent to inmate safety. Farmer, 511 U.S. at 834; Hearns v.  
12 Terhune, 413 F.3d 1036, 1040-41 (9th Cir. 2005).

13 The Court dismissed Plaintiff's Eighth Amendment claim for  
14 deliberate indifference to safety against Defendants Washington,  
15 Lang, Contreras and Brown in Case no. C 07-4277 CW (PR) on the  
16 ground that Plaintiff had not "alleged that he was in any more  
17 danger at HDSP than he was at SVSP." (Order of Service at 10.)  
18 The Court instructed Plaintiff that if he "can truthfully allege  
19 facts that would support a claim that particular prison officials  
20 transferred him to HDSP with deliberate indifference to particular  
21 facts establishing serious danger to his safety there, he may move  
22 for leave to amend his complaint." (Id.)

23 The Court now considers the proposed second amendment  
24 complaint which Plaintiff has filed in Case no. C 07-4277 CW (PR).  
25 In it, he alleges the "unwarranted adverse transfer was done so  
26 that prison official would have easier access to harass,  
27 retaliate," and "attempt to kill." (Second Am. Compl. at 9.) He  
28 claims HDSP officials "continually attempt[ed] and almost succeeded

1 [sic] several times" to kill Plaintiff. Plaintiff alleges these  
2 attempts "severely" injured and "permanently disabled" Plaintiff.  
3 (Id.)

4 While Plaintiff has alleged his belief that he was in more  
5 danger at HDSP, he has failed to allege facts that would support a  
6 claim that Defendants Washington, Lang, Contreras and B. Brown  
7 transferred him to HDSP knowing that he faced serious danger to his  
8 safety there. Instead, Plaintiff makes conclusory allegations that  
9 these Defendants were deliberately indifferent to his safety by  
10 transferring him to HDSP. Such conclusory allegations are not  
11 sufficient to show that these Defendants were "subjectively  
12 deliberately indifferent" to Plaintiff's safety. See Farmer, 511  
13 U.S. at 834. Because Plaintiff fails to state a cognizable claim,  
14 his motion for leave to amend to add his Eighth Amendment claim for  
15 deliberate indifference to his safety against Defendants  
16 Washington, Lang, Contreras and B. Brown is DENIED.

17 C. Plaintiff's Supplemental Motion to Add Information

18 Plaintiff moves to add information in connection with his  
19 deposition on October 7, 2010. In support of his motion, Plaintiff  
20 states "he will expound on facts in connection with incidents of  
21 Defendants P./B. Brown and Lang stoping [sic] along the way of  
22 forced transfer and forcing Plaintiff to drink and swallow a liquid  
23 substance that . . . discombobulated Plaintiff and made him more  
24 helpless . . . ." (Mot. to Add Information at 1.)

25 This claim appears to relate to the allegations in Case no.  
26 C 09-3003 CW (PR). Therefore, the Court construes Plaintiff's  
27 motion to add information as a motion to supplement his opposition  
28 in that case. Plaintiff is granted leave to file a supplemental

1 opposition to Defendants' motion to dismiss and motion for summary  
2 judgment in Case no. C 09-3003 CW (PR) within thirty (30) days of  
3 this Order. If Defendants wish to file a supplemental response to  
4 Plaintiff's supplemental opposition, they may do so no later than  
5 fifteen (15) days after Plaintiff's supplemental opposition is  
6 filed.

7 D. Defendant Ramirez

8 In Case no. C 09-3003 CW (PR), the Court found that Plaintiff  
9 stated a claim that Defendants Washington, Lang, Contreras and Jane  
10 Doe (now B. Brown) violated Plaintiff's Eighth Amendment rights by  
11 using excessive force against him on July 7, 2006 during his  
12 transfer to HDSP and by being deliberately indifferent to his  
13 serious medical needs when they failed to treat his injuries.  
14 Plaintiff also alleges in his proposed second amended complaint  
15 that Defendant Ramirez violated his Eighth and Fourteenth Amendment  
16 rights in that he "aided and abeded [sic] Defendants and other  
17 prison officials" in Plaintiff's transfer to HDSP. (Second Am.  
18 Compl. at 8.)

19 As noted above, a prison official violates the Eighth  
20 Amendment when two requirements are met: (1) the violation alleged  
21 must be, objectively, sufficiently serious, see Farmer, 511 U.S. at  
22 834 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)), and  
23 (2) the prison official must possess a sufficiently culpable state  
24 of mind, see id. (citing Wilson, 501 U.S. at 297). In determining  
25 whether a deprivation of a basic necessity, such as medical care,  
26 is sufficiently serious to satisfy the objective component of an  
27 Eighth Amendment claim, a court must consider the circumstances,  
28 nature, and duration of the deprivation. The more basic the need,

1 the shorter the time it can be withheld. See Johnson v. Lewis, 217  
2 F.3d 726, 731 (9th Cir. 2000).

3 In prison-conditions cases, the necessary state of mind is one  
4 of "deliberate indifference." See, e.g., Farmer, 511 U.S. at 834.  
5 A prison employee is deliberately indifferent if he knows that a  
6 prisoner faces a substantial risk of serious harm and disregards  
7 that risk by failing to take reasonable steps to abate it. Id. at  
8 837.

9 Liberally construed, Plaintiff's allegations that Defendant  
10 Ramirez "aided and abetted" the actions of Defendants Washington,  
11 Lang, Contreras and B. Brown of failing to attend to his injuries  
12 during his transfer to HDSP states a claim for deliberate  
13 indifference to his serious medical needs. See Estelle v. Gamble,  
14 429 U.S. 97, 104 (1976) (deliberate indifference to serious medical  
15 needs presents a cognizable claim for violation of the Eighth  
16 Amendment). Liberally construed, Plaintiff's allegations that  
17 Defendant Ramirez "aided and abetted" the actions of these  
18 Defendants during the transfer also state a claim for excessive  
19 force. Accordingly, Plaintiff has adequately plead cognizable  
20 claims against Defendant Ramirez for deliberate indifference to his  
21 medical needs and excessive force. Therefore, the Court GRANTS  
22 Plaintiff's motion for leave to amend to add these claims to Case  
23 no. C 09-3003 CW (PR).

24 However, Plaintiff's due process claim against Defendant  
25 Ramirez challenging his transfer to HDSP is not cognizable because  
26 it is well established that prisoners have no constitutional right  
27 to incarceration in a particular institution. See Olim v.  
28 Wakinekona, 461 U.S. 238, 244-48 (1983); Meachum v. Fano, 427 U.S.

1 215, 224 (1976). Further, Plaintiff's equal protection claim  
2 against Defendant Ramirez is not cognizable because does not argue  
3 that the mistreatment alleged occurred because of his race.

4 Accordingly, the Court DENIES Plaintiff's motion for leave to  
5 amend to add his Fourteenth Amendment due process and equal  
6 protection claims against Defendant Ramirez.

7 E. Defendants Sanquist and Bocello

8 Plaintiff alleges Defendants Sanquist and Bocello violated his  
9 Eighth and Fourteenth Amendment rights on a number of occasions.<sup>8</sup>  
10 Plaintiff claims Defendant Sanquist "maliciously and sadistically"  
11 struck Plaintiff with a pair of handcuffs, "chipping [sic]  
12 Plaintiff's tooth," in violation of his Eighth and Fourteenth  
13 Amendment rights. (Id. at 9.) Defendant Bocello allegedly  
14 sexually assaulted him in violation of his Eighth and Fourteenth  
15 Amendment rights. Plaintiff also alleges both Defendants Sanquist  
16 and Bocello forced Plaintiff to sleep in a "cage" on a concrete  
17 floor for two days without a mattress, bedding or food, in  
18 violation of his Eighth and Fourteenth Amendment rights. (Id.)  
19 The Court DENIES Plaintiff's motion for leave to amend to add his  
20 claims alleged against Defendants Sanquist and Bocello because they  
21 are not related to the claims before the Court. If Plaintiff  
22 wishes to raise these claims, he must file a new civil rights  
23 action after exhausting his administrative remedies.

24 \_\_\_\_\_

25 <sup>8</sup> Plaintiff also alleges Defendants Evans and Martines  
26 violated his Eighth and Fourteenth Amendment rights because they  
"never responded to Plaintiff's request for interviews" concerning  
his transfer to HDSP and, as such, aided and abetted the transfer.  
27 (Second Am. Compl. at 7-8). Plaintiff raised this claim in his  
original complaint, and the Court did not find it cognizable.  
28 Therefore, the Court does not grant Plaintiff leave to raise this  
claim again.

CONCLUSION

For the foregoing reasons,

1. The Court orders the following as to Case. no. c 07-4277  
CW (PR):

a. The Court finds that the evidence is adequate to support Defendant Bailey's affirmative defense of non-exhaustion of administrative remedies, and GRANTS Defendant Bailey's Rule 12(b) unenumerated motion to dismiss Plaintiff's excessive force and deliberate indifference to safety claims as unexhausted (docket no. 85 in Case no. C 07-4277 CW (PR)). Dismissal is without prejudice to re-filing if Plaintiff is able to exhaust these claims.

b. The Clerk shall enter judgment in accordance with this Order, terminate all pending motions in this case, including Plaintiff's motion to add information (docket no. 83 in Case no. C 07-4277 CW (PR)), and close the file.

2. The Court orders the following as to Case no. C 09-3003  
CW (PR):

a. The Clerk shall file Plaintiff's second amended complaint (docket no. 46 in Case no. C 07-4277 CW (PR)) in Case no. C 09-3003 CW (PR).

b. The Court partially GRANTS the dispositive motion (docket no. 38) filed in Case no. C 09-3003 CW (PR) as to Defendant P. Brown. All claims against Defendant P. Brown are DISMISSED. The Clerk is directed to amend the docket in Case no. C 09-3003 CW (PR) to reflect the correct initial of Defendant Brown's first name as "B."

c. The Court will not rule on Defendants Washington's, Lang's and Contreras's motion to dismiss and motion for summary

1 judgment in Case no. C 09-3003 CW (PR). Plaintiff's Supplemental  
2 Motion to Add Information (docket no. 36 in Case no. C 09-3003 CW  
3 (PR)) -- which has been construed as a motion to supplement his  
4 opposition -- is GRANTED. Plaintiff may file a supplemental  
5 opposition to these Defendants' motion to dismiss and motion for  
6 summary judgment within thirty (30) days of this Order. If  
7 Defendants Washington, Lang and Contreras wish to file a  
8 supplemental response to Plaintiff's supplemental opposition, they  
9 may do so no later than fifteen (15) days after Plaintiff's  
10 supplemental opposition is filed.

11           d. Plaintiff's motion for leave to amend to add his  
12 claims alleged against Defendants Sanquist and Bocello is DENIED  
13 because they are not related to the claims before the Court. If  
14 Plaintiff wishes to raise these claims, he must file a new civil  
15 rights action after exhausting his administrative remedies.

16           e. Plaintiff has alleged cognizable Eighth Amendment  
17 claims against Defendant Ramirez for use of excessive force and  
18 deliberate indifference to his serious medical needs; therefore,  
19 the Court GRANTS his motion for leave to amend to add these claims  
20 to Case no. C 09-3003 CW (PR). The Court DENIES Plaintiff's motion  
21 for leave to amend to add his Eighth Amendment claim for deliberate  
22 indifference to his safety against Defendants Washington, Lang,  
23 Contreras and Brown as well as his due process and equal protection  
24 claims against Defendant Ramirez.

25           f. The Clerk shall mail a Notice of Lawsuit, a Request  
26 for Waiver of Service of Summons, two copies of the Waiver of  
27 Service of Summons, copies of the complaint and all attachments  
28 thereto (docket no. 1 in Case no. C 09-3003 CW (PR)), the second

1 amended complaint and all attachments thereto (docket no. 46 in  
2 Case no. C 07-4277 CW (PR)), the Orders dated November 19, 2008 and  
3 July 2, 2009 (docket nos. 14, 45 in Case no. C 07-4277 CW (PR)),  
4 and this Order to SVSP Officers E. Ramirez and B. Brown. The Clerk  
5 shall also mail a copy of the complaint and a copy of this Order to  
6 Adrian Shin at the State Attorney General's Office in San  
7 Francisco, the attorney representing Defendants Washington, Lang  
8 and Contreras. Additionally, the Clerk shall mail a copy of this  
9 Order to Plaintiff.

10 g. Defendants Ramirez and B. Brown are cautioned that  
11 Rule 4 of the Federal Rules of Civil Procedure requires them to  
12 cooperate in saving unnecessary costs of service of the summons and  
13 complaint. Pursuant to Rule 4, if these Defendants, after being  
14 notified of this action and asked by the Court, on behalf of  
15 Plaintiff, to waive service of the summons, fail to do so, they  
16 will be required to bear the cost of such service unless good cause  
17 be shown for their failure to sign and return the waiver form. If  
18 service is waived, this action will proceed as if these Defendants  
19 had been served on the date that the waiver is filed, except that  
20 pursuant to Rule 12(a)(1)(B), they will not be required to serve  
21 and file an answer before sixty (60) days from the date on which  
22 the request for waiver was sent. (This allows a longer time to  
23 respond than would be required if formal service of summons is  
24 necessary.) Defendants Ramirez and B. Brown are asked to read the  
25 statement set forth at the foot of the waiver form that more  
26 completely describes the duties of the parties with regard to  
27 waiver of service of the summons. If service is waived after the  
28 date provided in the Notice but before these Defendants have been

1 personally served, the Answer shall be due sixty (60) days from the  
2 date on which the request for waiver was sent or twenty (20) days  
3 from the date the waiver form is filed, whichever is later.

4 h. Defendants Ramirez and Brown shall answer the  
5 complaint in accordance with the Federal Rules of Civil Procedure.  
6 The following briefing schedule shall govern dispositive motions in  
7 this action:

8 1) No later than thirty (30) days from the date  
9 these Defendants' answer is due, they shall file a motion for  
10 summary judgment or other dispositive motion. The motion shall be  
11 supported by adequate factual documentation and shall conform in  
12 all respects to Federal Rule of Civil Procedure 56. They may join  
13 in Defendants Washington's, Lang's and Contreras's motion to  
14 dismiss and motion for summary judgment. If these Defendants are  
15 of the opinion that this case cannot be resolved by summary  
16 judgment, they shall so inform the Court prior to the date the  
17 summary judgment motion is due. All papers filed with the Court  
18 shall be promptly served on Plaintiff.

19 2) Plaintiff's opposition to the dispositive  
20 motion shall be filed with the Court and served on these Defendants  
21 no later than thirty (30) days after the date on which their motion  
22 is filed. The Ninth Circuit has held that the following notice  
23 should be given to pro se plaintiffs facing a summary judgment  
24 motion:

25 The defendant has made a motion for summary  
26 judgment by which they seek to have your case dismissed.  
27 A motion for summary judgment under Rule 56 of the  
Federal Rules of Civil Procedure will, if granted, end  
your case.

28 Rule 56 tells you what you must do in order to

1           oppose a motion for summary judgment. Generally, summary  
2 judgment must be granted when there is no genuine issue  
3 of material fact -- that is, if there is no real dispute  
4 about any fact that would affect the result of your case,  
5 the party who asked for summary judgment is entitled to  
6 judgment as a matter of law, which will end your case.  
7 When a party you are suing makes a motion for summary  
8 judgment that is properly supported by declarations (or  
9 other sworn testimony), you cannot simply rely on what  
10 your complaint says. Instead, you must set out specific  
11 facts in declarations, depositions, answers to  
12 interrogatories, or authenticated documents, as provided  
13 in Rule 56(e), that contradict the facts shown in the  
14 defendant's declarations and documents and show that  
15 there is a genuine issue of material fact for trial. If  
16 you do not submit your own evidence in opposition,  
17 summary judgment, if appropriate, may be entered against  
18 you. If summary judgment is granted [in favor of the  
19 defendant], your case will be dismissed and there will be  
20 no trial.

21           See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en  
22 banc).

23           Plaintiff is advised to read Rule 56 of the Federal Rules of  
24 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)  
25 (party opposing summary judgment must come forward with evidence  
26 showing triable issues of material fact on every essential element  
27 of his claim). Plaintiff is cautioned that because he bears the  
28 burden of proving his allegations in this case, he must be prepared  
to produce evidence in support of those allegations when he files  
his opposition to these Defendants' dispositive motion. Such  
evidence may include sworn declarations from himself and other  
witnesses to the incident, and copies of documents authenticated by  
sworn declaration. Plaintiff will not be able to avoid summary  
judgment simply by repeating the allegations of his complaint.

29           3) If Defendants Ramirez and Brown wish to file a  
30 reply brief, they shall do so no later than fifteen (15) days after  
31 the date Plaintiff's opposition is filed.

1                   4) The motion shall be deemed submitted as of the  
2 date the reply brief is due. No hearing will be held on the motion  
3 unless the Court so orders at a later date.

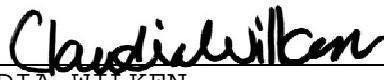
4                   i. It is Plaintiff's responsibility to prosecute this  
5 case. Plaintiff must keep the Court informed of any change of  
6 address and must comply with the Court's orders in a timely  
7 fashion.

8                   j. Extensions of time are not favored, though  
9 reasonable extensions will be granted. Any motion for an extension  
10 of time must be filed no later than fifteen (15) days prior to the  
11 deadline sought to be extended.

12                  3. This Order terminates Docket nos. 83 and 85 in Case no.  
13 C 07-4277 CW (PR) and Docket no. 36 in Case no. C 09-3003 CW (PR).

14                  IT IS SO ORDERED.

15 DATED: 3/31/2011

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

MALIK JONES,  
Plaintiff,

Case Number: CV07-04277 CW  
CV09-3003CW

MIKE EVANS, WARDEN et al.,  
Defendant.

## **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on March 31, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
located in the Clerk's office.

14 Malik Jones K-09065  
FC-O-3-116  
15 P.O. Box 1050  
Soledad, CA 93960

17 Adrian Shin  
18 Deputy Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102

20 Officer E. Ramirez  
Salinas Valley State Prison  
P.O. box 1020  
21 Soledad, CA 93960-1020

22 Officer B.Brown  
23 Salinas Valley State Prison  
P.O. box 1020  
24 Soledad, CA 93960-1020

Dated: March 31, 2011

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk